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JMR

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

LEE BOYD MALVO,

Defendant.

Criminal No. 102888

**CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO
MOVANTS' MOTIONS TO RECORD AND TELECAST PROCEEDINGS,
FOR STILL PHOTOGRAPHY, AND FOR POINT-TO-POINT TELECAST
OF PRETRIAL AND TRIAL PROCEEDINGS**

COMES NOW, the Defendant, Lee Boyd Malvo, by and through counsel, and respectfully requests that this Honorable Court deny Movants' Motions to record and telecast proceedings, for still photography, and for point-to-point telecast of the pretrial and trial proceedings.

LEGAL STANDARD

Virginia Code § 19.2-266 provides that in the trial of criminal cases, "the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial," For good cause shown, the Court may, in its sole discretion, prohibit coverage¹ in any case and to restrict coverage as it deems appropriate to meet the ends of justice. Va. Code § 19.2-266.

In drafting Virginia Code § 19.2-266, the Virginia General Assembly did not provide a

¹ This memorandum will define "coverage" as set forth in the Movants' Motions: The recording and broadcasting of judicial proceedings by radio or television, still photography, and point-to-point telecast.

specific set of circumstances that justify an exclusion of cameras from the courtroom. Further, the Virginia courts have not provided a checklist of approved findings that a trial judge must make to properly render such a decision. Instead, upon consideration of Virginia Code § 19.2-266, Virginia courts have uniformly held that conclusory allegations or assertions of probabilities or prejudice, without more, do not justify exclusion of cameras from courtrooms. *See Vinson v. Commonwealth*, 258 Va. 459 (1999), *Stewart v. Commonwealth*, 245 Va. 222 (1993), and *Fisher v. Commonwealth*, 236 Va. 403 (1988).

When making this decision, however, the Court must consider of paramount importance its overriding duty to insure that the defendant is accorded a fair trial as guaranteed by the due process requirements of the Virginia and United States Constitutions. "Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." *Chandler v. Florida*, 449 U.S. 560, 574 (1981). Moreover, the United States Supreme Court has held that the press and public have a *qualified* but not absolute First Amendment right to attend a criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)(emphasis added).²

In the United States Supreme Court case of *Estes v. Texas*, 381 U.S. 532 (1965), Justice Harlan, in a concurring opinion, described the "grave potentialities for distorting the integrity of

² Exclusion of electronic broadcast coverage is, of course, entirely different from closure of the proceedings which would implicate First Amendment rights. *See Richmond Newspapers, Inc.*, 448 U.S. 555. Virginia Code § 19.2-266, by contrast, allows the Court to exclude a form of media coverage which is not subject to any constitutional guarantee and, indeed, is uniformly barred in the federal courts. *See Fed. R. Crim. P. 53. See also, Nixon v. Warner Communications*, 435 U.S. 589, 610 (1978)(Constitution does not "require that the trial - or any part of it - be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.")

the judicial process bearing on the determination of the guilt or innocence of the accused, and , more particularly, for casting doubt on the reliability of the fact-finding process” in a televised jury trial.

To increase the possibility of influence and the danger of a “popular verdict” by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner v. Louisiana*, 379 U.S. 466, 472-73. As we recently observed in *Turner*, “Mr. Justice Holmes stated no more than a truism when he observed that ‘Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.’ *Frank v. Mangum*, 237 U.S. 309, at 349 (dissenting opinion).” *Id.*, at 472. The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

Estes v. Texas, 381 U.S. at 592-93. The *Estes* case was reversed because the petitioner was deprived of his due process right under the United States Constitution by the excessive televising and broadcasting of his trial.

Movants rely heavily upon the United States Supreme Court case of *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555 (1980) in support of their motion. This decision, however, failed to carry a majority opinion from the court. Instead, a majority of the justices agreed with the result, but virtually each individual justice wrote an opinion setting forth their reason for their decision. As a result, any emphasis upon that case as setting forth hard and fast constitutional principles regarding this issue should be questioned. Moreover, this decision did not involve the issue of cameras in the courtroom, rather it addressed whether the press and the public could be excluded from the courtroom altogether.

ARGUMENT

The prosecution of Lee Boyd Malvo and John Allen Muhammad in Fairfax and Prince William Counties has been the focus of intense local, national, and to some extent, global media attention. On November 7, 2002, Attorney General John Ashcroft stated in a press conference, “[i]nnocent victims from Maryland, Virginia, the District of Columbia, Alabama and Louisiana have paid the ultimate price. It is appropriate - it is imperative - that the ultimate sanction be available for those convicted of these crimes . . . since the arrests . . . We are moving forward aggressively with a multiple-state investigation that remains active, ongoing and evolving.” The United States government “selected” Virginia to prosecute Mr. Malvo, not to address a fair trial process on all the issues, but rather upon the assumption that Fairfax County would provide the greatest assurance that Mr. Malvo would receive the death penalty as easily and quickly as possible. Virginia Attorney General Jerry Kilgore, speaking on “Fox News Sunday” stated that Virginia would be best positioned to prosecute this case because Virginia law would allow for the easiest application of the death penalty and “we can move quickly.”

Since his arrest, Mr. Malvo has been indicted or charged with multiple serious offenses, including capital murder, in other Virginia jurisdictions, Maryland, the District of Columbia, Alabama, and Louisiana. Similar investigations are ongoing in Georgia, Arizona, and Washington State. High-profile cases such as this one require additional safeguards in order to ensure fairness to the Accused in this case and in all other jurisdictions where charges have been filed. Cameras in the courtroom, whether video, still, or point-to-point, will only hinder the fair trial process in this prosecution, and also in jurisdictions where other charges are pending.

“This Court has long recognized that adverse publicity can endanger the ability of a

defendant to receive a fair trial.” *Gannett Co., Inc. v. Depasquale, County Court Judge of Seneca County, N.Y., Et Al.*, 443 U.S. 368, 378, citing, *Sheppard v. Maxwell*, 384 U.S. 222 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1966); *Marshall v. United States*, 360 U.S. 310 (1959). “To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.” *Gannett Co., Inc.*, *supra* at 378, *citing Sheppard, supra*. “[T]he measures a judge takes or fails to take to mitigate the effects of pretrial publicity – the measures described in *Sheppard* – may well determine whether the defendant receives a trial consistent with the requirements of due process.” *Nebraska Press Association v. Stuart*, 427 U.S. 539, 555 (1976).

In *Nebraska Press*, the United States Supreme Court outlined a number of actions a trial judge could take in order to assure a fair trial. These actions included continuing the case until the publicity threat abates, transferring the case to another county not permeated with publicity, sequestering jurors during the trial, and even ordering a new trial if publicity threatens the fairness of the outcome. The Court went beyond the solution to publicity problems, however, and instructed judges in *preventing* a threat to a defendant’s sixth and fourteenth amendment rights.

But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Nebraska Press, 427 U.S. at 553-54 *quoting Sheppard*, 384 U.S. at 362-63.

The allegations giving rise to this case present this Court with such extreme, unique and unusual circumstances that exclusion of coverage from the courtroom is not only warranted, but also is necessary. The unique circumstances in this case require exclusion given that cameras in

the courtroom would prejudice (1) Mr. Malvo's right and ability to obtain a fair and impartial jury in this jurisdiction or any other, (2) the ability of the prosecution to protect witnesses from intimidation, influence or distraction, (3) the ability of Mr. Malvo to call for witnesses in the absence of intimidation, undue influence and distractions, (4) Mr. Malvo's right to have a fair trial such that the court, counsel, court personnel, witnesses, and trial participants are not distracted by the presence of cameras, (5) the additional pressure the ultimate jurors, already facing the huge task of setting aside public perception and pressure will receive, (6) the likelihood from pretrial proceedings that evidentiary matters will be revealed and argued, (7) the greater likelihood the jury will have to be sequestered, and (8) the impact that coverage of this case would have on the ability of Mr. Malvo to receive a fair trial in any of the other jurisdictions where capital murder, first degree murder, and numerous other serious charges are pending.

1. PREJUDICIAL TAINING OF THE JURY POOL

Recording, telecasting, and still photography of the pretrial and trial proceedings in this case will taint the potential jury pool in this and the other cases by inundating the population with information they would not otherwise be able to consider as evidence, or which would not be presented in the manner properly presented at trial. It is anticipated that the *voir dire* in this case will require a lengthy, thorough and methodical approach by counsel in order to assure a fair and impartial jury. The repetitious broadcast of selective "sound bites" from the pretrial hearings would compound the already existing difficulties in seating a jury in this case. Still photographs capture images less than a second in duration, often contorting facial expressions and body language that requires immediate presence to discern contextually. Additionally, lighting, posture, and clothing all contribute to the final image, necessitating a cautious examination to decide on a

photograph that accurately and fairly depicts reality. Repetitious broadcast and publishing, without regard to the prejudice and context of the segments, will quickly spread through the media, ingraining certain "facts" to the potential jury pool, divesting the jury of its fact-finding mission.

Knowledge that the proceedings are being covered may also intimidate jurors. Excluding coverage from the courtroom will help preserve the anonymity of the jurors who are selected to serve and minimize the potential for a "popular verdict." *See Estes*, 381 U.S. at 592 (Harlan, J., concurring).

The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them.

Id.

Furthermore, any retrial of this case, or any future trial in another jurisdiction, would be affected by the national media saturation. Potential jurors who have seen any portion of the first trial would clearly be tainted. For example, evidence that is not admissible at a retrial or subsequent trial would already have made its way into the public domain. Witnesses called by Mr. Malvo may experience recrimination from the public and be hesitant or even unwilling to testify in a retrial subsequent trial. As a result, permitting coverage in the courtroom will prevent Mr. Malvo from having a fair and impartial jury in this jurisdiction and any other before which he is brought for prosecution.

2. PREJUDICIAL INFLUENCE OF WITNESSES

As the movants have submitted, the allegations giving rise to this case have had a deep effect on people in the Washington Metropolitan area, and nationally. Prior to this case going forward in Fairfax County, jurisdictions competed for the ability to prosecute, convict and execute the suspects. The nature of the prosecution of this case will involve witnesses and evidence from around the country and possibly beyond the borders. Commonwealth Attorney Robert Horan stated, "we can use evidence of homicides committed in other jurisdictions, because under the Virginia statute we aren't trying those other crimes, we're using those other crimes to elevate our crime into the capital murder section."

Given the enormous amount of pretrial publicity in this case, courtroom coverage could intimidate, influence or distract witnesses – especially those already intimidated by our judicial system. One or more might refuse to cooperate or testify, may withhold their full testimony, refuse to be interviewed by investigators, or even alter their testimony because of the presence of the cameras. Witnesses to be called by Mr. Malvo may simply refrain from coming forward for fear of being ostracized. Assuredly, knowing that they are on television, even witnesses who *are* comfortable testifying would find it far more difficult to focus solely on the questions being asked and providing full, accurate answers, which is crucial to a fair trial.

The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony.

Estes, 381 U.S. at 547.

3. DISTRACTING THE ADMINISTRATION OF JUSTICE

Of primary concern to this Court are the “due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment [that] require a procedure that will assure a fair trial . . .” *Estes*, 381 U.S. at 540. “[T]he life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media . . .” *Id.*

This Court and counsel must be focused upon the task of assuring Mr. Malvo a fair trial, toward the end of reaching an outcome based *solely* on the evidence presented at trial. To do so, this must remain the key focus throughout, which is difficult for all concerned when cameras are present. Courtroom coverage adds an unnecessary distraction to the already complex duties of participants in a capital murder trial. “A major aspect of the problem is the additional responsibilities the presence of [coverage] places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when [coverage] comes into the courtroom he must also supervise it.” *Estes*, 381 U.S. at 548.

The supervisory role of this Court is even more apparent from the text of Va. Code § 19.2-266. Under the section entitled “Coverage Allowed,” the Court must assure that no jurors are depicted in recordings or still photographs. Absent a review of the contact sheets and video, the Court risks that one or more jurors might unwittingly be caught on film. Moreover, no sound recording be made of conferences between the attorneys and their client, or among co-counsel. Again, the Court would have to review video to assure that the attorney client privilege, confidences, and strategy are not aired during public broadcast. If the Court chose to delegate this duty to the media representative, Mr. Malvo’s counsel would then be divested of *their* duty to assure due process.

Media coverage also causes a practical disruption of courtroom proceedings. Movants have stated that, in accordance with Va. Code § 19.2-266, that two television cameras would be placed in the courtroom. The television cameras will require an operator to move the field of view and focus the lens, even if only periodically. This, and the camera's constant presence – manned or not -- will distract jurors and witnesses, serving as a constant reminder that the proceedings are being watched by an audience.

The still photographer will have two cameras with two lenses for each camera. The changing of lenses and switching of cameras will involve movement within the courtroom that will call greater attention to the fact that the case is under the constant scrutiny of the public. Cameras also make noises which will be distracting, as the courtroom has acoustics which amplify the slightest sound. This Court employs a strict policy during “every-day” proceedings that silence be maintained. The Court insists that gallery members, other attorneys, etc., not distract proceedings by talking or reading books, newspapers, or making other disruptive noises or movements. This practice is strictly enforced even when the court is filled only with attorneys, such as on Term Day or Motions Days. Certainly, this policy should not be dispensed with for a trial which requires that the Court and the jury be able to pay the absolute closest attention possible to the evidence being presented.

4. POINT-TO-POINT TELECAST DIVESTS THE COURT AND COUNSEL OF SUPERVISORY ROLES PURSUANT TO VA. CODE § 19.2-265.1 AND IS CONTRARY TO THE PROVISIONS OF VA. CODE § 19.2-266

Fairfax County has moved this Court to allow point-to-point telecast of the trial proceedings to the meeting room in the Massey Building. The County asserts that the limited telecast would serve at least four distinct groups: victims and families, members of the Sniper

Task Force, the media, and the public. The County further asserts that "Courtroom staff and the Sheriff's deputies could locate microphones at strategic points in the courtroom" and that if needed, "additional networking by the County's Department of Cable Communications could be accomplished well before the trial date."

Va. Code § 19.2-265.1 states that "[i]n the trial of every criminal case, the court, . . . may upon its own motion and shall upon the motion of either the attorney for the Commonwealth or any defendant, require the exclusion of every witness to be called, including, but not limited to, police officers or other investigators; . . ." This "rule on witnesses" will be requested by counsel at every proceeding and during the trial of this case. The common practice for enforcement of the rule on witnesses is delegated to the supervision of the Court and counsel.

Should the Court permit point-to-point telecast, the Court divests itself and counsel of the ability to supervise the exclusion of witnesses mandated by Va. Code § 19.2-266. A separate viewing location in a different building prohibits the Court and counsel from maintaining the sanctity of this statute. Moreover, Fairfax County has specifically stated that the telecast would be for "victims and families" and "members of the Sniper Task Force," both of which groups include definite and potential witnesses in this trial. Police and Sheriff's deputies will occupy the sole position to observe whether definite or potential witnesses observe the trial proceedings.

Moreover, Va. Code § 19.2-266 specifically states, in the last paragraph, that "All electronic media and still photography coverage of public judicial proceedings authorized by this section, with the exception of electronic or photographic means authorized for the perpetuation of the record or parts thereof *shall be conducted at no cost to the Commonwealth*" (emphasis added). The County has clearly stated in its Motion that it plans to use "Courtroom staff and the

Sheriff's deputies" in addition to the County's "Department of Cable Communications" to set up the point-to-point telecast. This use of County resources is contrary to the statute and is ironic given public declarations decrying the cost of this trial to the County and the Commonwealth. Furthermore, the seating of dozens of Sniper Task Force members will necessitate overtime pay to not only the law enforcement viewers, but to the personnel that will maintain the viewing area.

CONCLUSION

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes*, 381 U.S. at 540. Although an extensive, legitimate public interest exists in this case and it is understandable that the public might want to watch this trial, the Court cannot ignore the constitutional rights of Mr. Malvo. The purpose of this trial is to determine the innocence or guilt of this defendant for the specific crimes charged in the indictments. It remains a bedrock principle of our legal system that the courts have the right "to conduct their business in an untrammelled way." *Wood v. Georgia*, 370 U.S. 375, 383 (1962). To ensure that both Mr. Malvo and the Commonwealth of Virginia receive a fair and orderly trial, the Movants' Motions to record and telecast proceedings, for still photography, and for point-to-point telecast should be denied.

Respectfully submitted,

LEE BOYD MALVO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, first class to:

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this 24th day of February, 2003.

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